



**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):26.....11.....2012.....
ម៉ោង (Time/Heure) :.....13:50.....
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:.....SANN DAOR.....

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Date: 26 November 2012
Original language(s): Khmer/English/French
Classification: PUBLIC

DECISION ON ACCUSED IENG SARY'S FITNESS TO STAND TRIAL

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
NUON Chea
IENG Sary
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Arthur VERCKEN
Jacques VERGÈS
Anta GUISSÉ

1. INTRODUCTION

1. The Accused IENG Sary ("Accused"), who is 87 years of age, was hospitalised on 7 September 2012 with symptoms of fatigue, shortness of breath, and dizziness.¹ The Trial Chamber has since recalled court-appointed geriatric expert Professor John CAMPBELL ("Expert Geriatrician"), in consultation with other qualified specialists, to examine the Accused, perform or identify any necessary testing, report on the Accused's health, and make recommendations concerning his medical care.² Being seised of this report and following a hearing during which the expert testified and the parties made submissions, the Trial Chamber issues this decision concerning the Accused's fitness to stand trial.³

2. PROCEDURAL BACKGROUND

2. During his initial medical examination on 20 December 2007, the Accused was diagnosed with a cardiovascular condition, urological disorders and arthritis of the lower spine.⁴ Between 28 April and 2 May 2008, two urologists appointed by the Co-Investigating Judges recommended measures to address the Accused's urological disorders and a mattress to alleviate his back pain.⁵ Other medical reports issued between 9 October 2008 and 28 July 2009 determined that the Accused's overall physical condition was stable, but that it could change at any time. Further, the Accused's cardiac condition required strict monitoring and improvement was unlikely.⁶ It was noted that no particular arrangements were necessary in detention or during proceedings for the Accused's urological condition.⁷

¹ Medical Report of Accused, E11/86/2, 11 September 2012.

² Memorandum, Subject: "Re-appointment of Dr. A. John CAMPBELL (IENG Sary)", E238, 8 October 2012, para. 2.

³ Expert Report Relating to Mr. IENG Sary Prepared in Response to Trial Chamber Request (E238), E238/4, 6 November 2012 ("November 2012 Expert Report"). The Accused consented to the public classification of these proceedings: T., 8 November 2012, p. 11; IENG Sary's Consent Letter to Public Discussion of his Health Issues, E1/142.2, 8 November 2012.

⁴ Medical Report, A/100/I, 13 November 2007, p. 3 (recommending that the Accused sleep on a firm mattress, avoid salty food, and avoid shock to the lower spine). In January, February and March 2008, these diagnoses and recommendations were confirmed with little variation following treatment for chest pain and hematuria (the presence of blood in the urine). Medical Report, A/134/I, 28 January 2008, p. 4 (after treatment for acute chest pain); Medical Report, B3, 9 February 2008, pp. 2-3 (after treatment for total hematuria); Medical Report, B6, 7 March 2008, pp. 2-4 (after treatment for total hematuria).

⁵ 2008 Expert Report, pp. 9-11 (recommending that the Accused have a toilet or plastic urinal in close proximity).

⁶ Medical Report of Accused, B15/1, 9 October 2008, pp. 4-5; Interoffice Memorandum, Subject: "The state of health of IENG Sary", B15/3, 11 December 2008, p. 1; Interoffice Memorandum, Subject: "The state of health of IENG Sary", B15/3, 11 December 2008, p. 1.

⁷ Medical Report of Accused, B15/1, 9 October 2008, pp. 4-5.

3. On 17 September 2009, the Co-Investigating Judges appointed two psychiatrists to assess the Accused's fitness to stand trial.⁸ After four interviews with the Accused, the experts determined that the Accused's cognitive function was consistent with his age, his long-term memory was intact, there were no signs of mental disorder and that the Accused was fit to stand trial.⁹

4. In December 2009 and July 2010, the Accused's treating physicians reported no major changes in the Accused's chronic cardiac, urological and arthritic conditions. They recommended that the Accused do simple exercises to increase muscle strength and be closely monitored, noting that his cardiac condition was slowly worsening and tending towards relapse.¹⁰ They considered that improvement in either his cardiac or urological conditions was unlikely, but nonetheless concluded that hospitalisation was unnecessary.¹¹ The Case File was transferred to the Trial Chamber on 14 January 2011, committing the Accused for trial.¹²

5. Following the IENG Sary Defence ("Defence") request that the trial be conducted in half-day sessions due to the Accused's health, the Chamber appointed Professor A. John CAMPBELL, a geriatrician, to assess the fitness of the Accused to stand trial.¹³ On 13 June 2011, the Expert Geriatrician reported that the Accused suffered from congestive heart failure, degenerative back disease, and urinary frequency secondary to prostatic obstruction. None of these conditions affected the Accused's fitness to stand trial. Further, he found the Accused free of cognitive or memory impairment.¹⁴ The Accused did not contest the Expert Geriatrician's conclusions.¹⁵ On 17 November 2011, the Chamber informed the parties that proceedings would be held Monday to Thursday from 9am to 4pm.¹⁶

⁸ Expertise Order, B38, 17 September 2009.

⁹ Deposition of Psychologic Expertise, B38/4, 5 November 2009, pp. 3 (during three of which the Accused was lying on his bed due to his back pain) and 6.

¹⁰ Medical Report of Accused, B39/1, 18 December 2009, pp. 1-3; Medical Examination of Accused, B46/1, 18 July 2010, pp. 1, 3.

¹¹ Medical Report of Accused, B39/1, 18 December 2009, p. 3; Medical Examination of Accused, B46/1, 18 July 2010, pp. 1, 3.

¹² Decision on KHIEU Samphan's appeal against the closing order, D427/4/14, 13 January 2011; Decision on IENG Sary's appeal against the closing order, D427/1/26, 13 January 2011; Decision on IENG Thirith and NUON Chea's appeal against the closing order, D427/2/12, 13 January 2011.

¹³ IENG Sary's Motion to Conduct the Trial through Half-Day Sessions, E20, 19 January 2011; Order Assigning Expert, E62/3, 04 April 2011.

¹⁴ Geriatric Expert Report of IENG Sary dated on 13 June 2011 in Response to Trial Chamber's Order Assigning Expert – E62/3, E62/3/5, 13 June 2011.

¹⁵ Scheduling Order for Preliminary Hearing on Fitness to Stand Trial, E110, 11 August 2011, p. 2.

¹⁶ Memorandum, Subject: "Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011", E141, 17 November 2011. The Chamber later invited the Defence teams to consider whether sitting Monday, Tuesday, Thursday, and Friday – as opposed to Monday

6. Six months into the substantive hearing, on 17 May 2012, the Accused experienced difficulty breathing in the ECCC holding cell. He was treated immediately by on-duty physicians, and the Accused was transferred to the Khmer-Soviet Friendship Hospital (“hospital”) based on the Medical Unit’s recommendation.¹⁷ The Accused was diagnosed with acute bronchitis in addition to his existing ischemic heart disease. The treating physicians recommended that the Accused be discharged from the hospital, and that he should rest for two days.¹⁸ On 22 May 2012, the Accused returned to the Detention Facility.¹⁹

7. On 23 May 2012, Dr. LIM Sivutha, one of the Accused’s treating physicians, was invited before the Chamber to report on the ability of the Accused to participate in the proceedings.²⁰ He recommended that the Accused should participate in proceedings by audio-visual means only from the holding cell, from where his health could be constantly monitored.²¹ As the Chamber considered the Accused’s health condition at time prevented his presence either in the courtroom or holding cell, and as he had not waived his right to be present, the Chamber adjourned the hearing to the following week.²²

8. In June and July 2012, the Accused’s physicians, noting on-going dizziness and fatigue, requested that the Accused be permitted to participate in proceedings from the holding cell.²³ The IENG Sary Defence informed the Chamber that that the Accused complained of physical conditions impeding his ability to attend, and participate in, the proceedings.²⁴ The Accused’s physician testified that the Accused was only able to participate in the proceedings for an hour or two each day.²⁵ On 13 August 2012, one of the Accused’s treating physicians reported that the Accused was feeling dizzy and unable to concentrate.²⁶ As the Accused did not waive his

to Thursday – would be beneficial to their clients. Memorandum, Subject: “Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promoted Trial Efficiency”, E218, 3 August 2012, para. 9. No Defence team favoured this option.

¹⁷ Memorandum, Subject: “Emergency Treatment of the Accused IENG Sary at Khmer-Soviet Friendship Hospital”, E11/70/1, 18 May 2012; Report from the ECCC Medical Unit – Part A, E11/70.1, 17 May 2012.

¹⁸ Report concerning Accused health condition, E11/70/2, 20 May 2012. *See also*, T., 23 May 2012, pp.8-9.

¹⁹ Letter, Subject: “Return of the Accused IENG Sary from Khmer-Soviet Friendship Hospital to the Detention Facility”, E11/70/3, 23 May 2012.

²⁰ Letter, Subject: “Invitation for Dr. LIM Sivutha, Head of the Emergency Section, Khmer-Soviet Friendship Hospital, to explain before the Trial Chamber at the ECCC’s courtroom in the morning of Wednesday 23 May 2012”, E197, 21 May 2012.

²¹ T., 23 May 2012, pp. 9, 11.

²² T., 23 May 2012, pp. 17-19.

²³ Letter, Subject: “Report concerning the health condition of Accused IENG Sary”, E11/73/1, 11 June 2012; T., 18 July 2012, p.139.

²⁴ T., 19 July 2012, pp. 9-11.

²⁵ T., 19 July 2012, pp. 16-7.

²⁶ T., 13 August 2012, p. 2.

right to be present, the Chamber therefore adjourned for the rest of the day.²⁷ In view of the Accused's health concerns and in order to take advantage of their presence in Phnom Penh to reassess the fitness to stand trial of Accused IENG Thirith, the Chamber on 24 August 2012 requested Professor A. John CAMPBELL, Dr. Lina HUOT and Dr. Seena FAZEL ("court-appointed medical experts") to also examine and report on the Accused IENG Sary's health.²⁸ Between 27 and 29 August 2012, the court-appointed medical experts examined the Accused and determined that the Accused did not suffer from mental illness and did not have cognitive or memory impairment beyond that expected of someone his age. In their report of 3 September 2012, the experts concluded that the Accused was fit to stand trial.²⁹

9. The Accused was again admitted to hospital on 7 September 2012 for symptoms of fatigue, shortness of breath and dizziness.³⁰ According to subsequent hospital reports, the Accused experienced dizziness when making certain movements experienced back pain and peripheral paresthesia. However, his health condition remained stable or improved slightly over time. Later, the hospital reported that the Accused was alert with stable memory retention.³¹ Nonetheless, the hospital reported that the Accused "cannot return to his original health condition".³²

10. On 19 September 2012, Professor LIM Sivutha and Professor KY Bousuor, treating doctors of the Accused following his hospitalization on 7 September 2012, submitted a medical report and on 21 September 2012 testified before the Trial Chamber.³³ The doctors considered the Accused's dizziness was due to his heart condition as well as restricted blood flow to the brain.³⁴ At that time, they indicated that different treatment options were under consideration to address this suspected condition, including the possibility of surgery.³⁵

11. On 22 October 2012, the Defence alleged that on 16 and 17 October 2012, the Accused began coughing and vomiting, but that no doctors promptly responded. The Defence requested the Chamber to investigate this incident and later requested that the court-appointed

²⁷ T., 13 August 2012, pp. 8-10.

²⁸ Memorandum, Subject: "Medical Examination of Accused IENG Sary", E222, 24 August 2012.

²⁹ 3 September 2012 Report, pp. 8-9.

³⁰ Medical Report of Accused, E11/86/2, 11 September 2012.

³¹ Medical Report of Accused, E11/92/4, 24 October 2012; Medical Report of Accused, E11/92/5, 25 October 2012.

³² Treatment Report on Accused Hospitalised at Khmer-Soviet Friendship Hospital's Emergency Section, E11/89/1, 28 September 2012.

³³ Medical Report, E11/87/2, 19 September 2012; T., 21 September 2012.

³⁴ T., 21 September 2012, p. 14.

³⁵ T., 21 September 2012, pp. 16-17.

experts be informed of it, as well as identify the medical examinations to be conducted. The Defence also requested the experts to assess the quality of care at the hospital and review the testimony of one of the Accused's treating physicians.³⁶ The Chamber forwarded all material relevant to the Accused's hospitalisation to the Expert Geriatrician, who responded that it was difficult to be certain of the reasons for a change in the Accused's diagnosis based on written documents alone. The Chamber therefore reappointed the Expert Geriatrician, requesting him to return to Phnom Penh in order to further examine the Accused, consult with other qualified persons, have appropriate testing done, and report on the Accused's health.³⁷

12. On 5 and 6 November 2012, the Expert Geriatrician examined the Accused. He concluded that the Accused was weaker than previously and that he would require a greater level of individual care in the detention facility, but concluded that no further hospitalisation was necessary. He affirmed the Accused's fitness to stand trial, and recommended various measures to alleviate the symptoms of the Accused's chronic medical conditions. The Expert Geriatrician also recommended that the Accused make full use of the holding cell in order to participate in proceedings.³⁸

13. On 7 November 2012, the Accused was returned to the ECCC Detention Facility. The President ordered that the Accused be brought to the holding cell for the duration of the Expert Geriatrician's testimony.³⁹ On the morning of 8 November 2012, and contrary to the purposes for which consultation with outside medical personnel had been authorised by the Chamber, the Defence submitted a letter from a medical consultant criticising the 6 November 2012 report and the Expert Geriatrician's methods.⁴⁰ Thereafter, the Expert Geriatrician confirmed and clarified the findings in his report to the Chamber, including that continued hospitalisation was unnecessary.⁴¹ At the conclusion of the hearing, the Chamber ordered that the Accused be returned to the detention facility where he would continue to receive the same medical treatment as before, as well as any additional treatment recommended by the Expert

³⁶ Letter, Subject: "Upcoming medical examination of Accused and testimony from doctors", E238/2, 24 October 2012.

³⁷ Memorandum, Subject: "Re-appointment of Dr. A. John CAMPBELL (IENG Sary)", E238, 8 October 2012.

³⁸ November 2012 Expert Report, p. 6.

³⁹ Order to Bring, E202/30, 7 November 2012.

⁴⁰ Letter from Harold J. Bursztajn, MD to IENG Sary Defence Team, E238/6, 7 November 2012; *See also*, Annex - Email from defence team for IENG Sary concerning request to share expert report E238/4, E238/6.1, 14 November 2012 (*indicating* that the parties may consult with outside medical personnel only for the purposes of preparation for the forthcoming hearing). Despite containing trenchant criticisms of the Expert Geriatrician, the letter is not based on either his report or those previously prepared by the court-appointed medical experts, or any other medical information upon which such a conclusion could reasonably be based.

⁴¹ T., 8 November 2012, p. 138.

Geriatrician.⁴² The Chamber noted that the Accused had waived his right to be present for the testimony of witnesses scheduled during the remaining sessions in November 2012.⁴³

3. SUBMISSIONS

14. The IENG Sary Defence contends that the Accused is currently unfit to stand trial but nonetheless requests the Trial Chamber to defer consideration of this issue.⁴⁴ It notes that the Accused has to date cooperated by waiving his right to be present during the testimony of certain witnesses, thus allowing proceedings to continue in relation to some witnesses, but contends without further elaboration that the issue of the Accused's fitness to stand trial will be ripe only once the evidence of these witnesses concludes.⁴⁵ The IENG Sary Defence does not appear to contest the 3 September 2012 expert report, but submits that "something happened" between the examination and the Accused that immediately preceded this report and his hospitalization on 7 September 2012.⁴⁶ It further argues that it would be "reasonable and necessary" to appoint a new expert to conduct an independent evaluation of the Accused, whether immediately or in the future, without providing grounds to show why a substitution of the present Expert Geriatrician or medical experts is required.⁴⁷

15. On the basis of the available medical information, the Co-Prosecutors respond that while the Accused's health is fragile, his further hospitalization is unnecessary and that with adequate assistance, he is able to participate in the trial.⁴⁸ Further, the Trial Chamber must decide immediately upon the Accused's fitness, although this decision may in future be reconsidered should the Accused's health condition change.⁴⁹ The Co-Prosecutors submit, however, that, on a balance of probabilities, the Chamber would be unable currently to conclude that the Accused is unfit to plead.⁵⁰

16. The Civil Party Lead Co-Lawyers agree that there is no well-founded medical basis to undermine the Expert Geriatrician's findings.⁵¹ The Lead Co-Lawyers also concur that a

⁴² T., 8 November 2012, p. 139.

⁴³ T., 8 November 2012, p. 139.

⁴⁴ T., 12 November 2012, pp. 6, 13, 16, 21 (arguing that the Accused is unable to concentrate for more than five to fifteen minutes at a time).

⁴⁵ T., 12 November 2012, pp. 5-6, 12.

⁴⁶ T., 12 November 2012, pp. 23-25.

⁴⁷ T., 12 November 2012, pp. 7-11.

⁴⁸ T., 12 November 2012, pp. 26-27.

⁴⁹ T., 12 November 2012, p. 30.

⁵⁰ T., 12 November 2012, pp. 36-38.

⁵¹ T., 12 November 2012, pp. 40-41.

decision declaring the Accused fit to stand trial and rejecting any request for further expert examinations should be made as soon as possible.⁵²

17. In reply, the IENG Sary Defence submits that the Accused should be filmed in the holding cell or be present in the courtroom, where the court and public can observe his participation.⁵³ The IENG Sary Defence further indicated that should a decision be issued declaring the Accused IENG Sary fit to stand trial, it would seek the immediate severance of the Accused from the ongoing trial in Case 002/01.⁵⁴

4. APPLICABLE LAW

18. A Trial Chamber, on its own motion or that of the parties,⁵⁵ must be satisfied that an accused is currently capable of “meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings”.⁵⁶ In making this determination, a Chamber shall consider all pertinent material and relevant factors, including, as appropriate, its own observations.⁵⁷ A Chamber should further consider both the existence of particular medical conditions and their resulting impact on fitness.⁵⁸ The availability of practical measures mitigating the negative effects of any impairment must also be examined.⁵⁹

⁵² T., 12 November 2012, pp. 41-42.

⁵³ T., 12 November 2012, p. 45.

⁵⁴ T., 12 November 2012, pp. 15, 18-19, 45.

⁵⁵ Internal Rule 32; *see also Prosecutor v. Mladić*, ICTY Trial Chamber (IT-09-92-PT), Scheduling Order, 15 February 2012, paras 12-13 (“despite numerous intimations in court and in various filings by both parties [the Chamber] had not been seised of a request from either party for a medical examination, and as such ordered, *proprio motu*, a complete expert medical examination” and finding, on the basis of that medical examination, that there was nothing indicating that the accused could not attend court proceedings or that his health required modification of the trial schedule).

⁵⁶ The existence of fair trial rights presumes the capacity to exercise them: *see e.g.* Internal Rules 21(d) (right to be informed of charges, to be defended by a lawyer and to remain silent); 22(3) (right to freely and confidentially communicate with counsel); 81(1) (qualified right to be tried in his or her presence) and 85(1) (guaranteeing “the free exercise of defence rights”); *see also Prosecutor v. Gbagbo*, ICC Pre-Trial Chamber (ICC-02/11-01/11), Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings Before this Court, 2 November 2012 (“*Gbagbo* Decision”), paras 43, 49, 56 (rejecting the balance of probabilities standard in favour of a standard requiring that the Chamber is “satisfied”) and 86 (“The question is not whether [the accused] is at present in full possession of the higher or better faculties he may have had in the past but whether his current capacities are sufficient for him to take part in proceedings against him”) and Decision on IENG Thirith’s Fitness to Stand Trial, E138, 17 November 2012 (“*IENG Thirith* First Fitness Decision”), para. 27 (*citing Prosecutor v. Strugar*, ICTY Appeals Chamber (IT-01-42-A), Judgement (“*Strugar* Appeal Judgement”), 17 July 2008, para. 55).

⁵⁷ *IENG Thirith* First Fitness Decision, para. 29.

⁵⁸ *Gbagbo* Decision, para. 51 (*citing*, amongst others, *Strugar* Appeal Judgement, paras 61, 66).

⁵⁹ Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused IENG Thirith (SCC), E138/1/7, 13 December 2011, para. 37; *Gbagbo* Decision, paras 51, 102 and *Prosecutor v. Stanišić &*

19. An Accused has a qualified right to be physically present during the proceedings.⁶⁰ The ECCC Internal Rules and relevant international jurisprudence indicates that disruption of the proceedings may justify alternatives to an Accused's physical presence where these are suitable, necessary and proportionate.⁶¹

20. Within the ECCC legal framework, an Accused may opt to participate in proceedings remotely. The Chamber may also order participation through audio-visual means where the interests of justice so require. Internal Rule 81(5) provides as follows:

Where, due to health reasons or other serious concerns, the Accused cannot attend in person before the Chamber but is otherwise physically and mentally fit to participate, the Chamber may either continue the proceedings in the Accused's absence with his or her consent or, where the Accused's absence reaches a level that causes substantial delay and, where the interests of justice so require, order that the Accused's participation before the Chamber shall be by appropriate audio-visual means.

21. The ECCC courtroom infrastructure includes specially-equipped holding cells which contain audio-visual equipment transmitting a live feed of the proceedings and a telephone enabling the Accused to freely and confidentially communicate with his counsel. . An adjustable bed, specifically designed to alleviate the Accused's physical condition, is being installed.⁶² Requiring the Accused to participate in proceedings from the holding cell, to which members of his Defence team also have access to at all times, is fully consistent both with his fundamental rights and the legal framework of the ECCC.⁶³

Simatović, ICTY Appeals Chamber (IT-03-69-AR73.2), Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 (“*Stanišić* Appeals Decision”), paras 19-20.

⁶⁰ Internal Rule 81(1); *see also Stanišić* Appeals Decision, para. 6; *Milošević v. Prosecutor*, ICTY Appeals Chamber (IT-02-54-AR73.7), Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (“*Milošević* Appeal Decision”), para. 13; *Zigiranyirazo v. Prosecutor*, ICTR Appeals Chamber (ICTR-01-73-AR73), Decision on Interlocutory Appeal, 30 October 2006 (“*Zigiranyirazo* Appeal Decision”), para. 13.

⁶¹ Disruption to proceedings need not be intentional in order to warrant these measures: *see* Internal Rules 37(2) and 81(5); *see also Stanišić* Appeals Decision, paras 6, 19 and *Milošević* Appeal Decision, para. 14.

⁶² E-mail of from Senior Detention Liaison Officer, E238/7, 20 November 2012; T., 8 November 2012, pp. 26 (noting that a bed which could be elevated at the head would make it easier for the Accused to look at the monitor), 133.

⁶³ *See e.g. Stanišić* Appeals Decision, paras 18 (delay must be substantial in order to warrant derogation from the fundamental right of the Accused to be present) and 20 (audio-visual means must render the Accused able to participate) and *Milošević* Appeal Decision, para. 19 (a Chamber must craft a working regime that minimises the practical impact on an Accused's rights to the extent required by the interests of justice).

22. Finally, the Chamber must balance the right of the Accused to be present with both his right, as well as that of any Co-Accused, to fair and expeditious proceedings.⁶⁴

5. FINDINGS

5.1. Introduction

23. The Accused's fitness to stand trial has been assessed by multiple psychiatrists and a geriatrician and has been the subject of expert reports on four separate occasions: in September 2009, June 2011 and most recently in September and November 2012. The reports resulting from these examinations show that the Accused has at no time during proceedings in Case 002 suffered from any cognitive or memory impairment beyond that expected of someone his age.⁶⁵ Most recently, on 6 November 2012, the Expert Geriatrician determined that there had been no change in the Accused's health warranting re-assessment of the court-appointed experts' conclusion of 3 September 2012 that the Accused is fit to stand trial.⁶⁶

24. The IENG Sary Defence does not as such challenge the recent reports of the court-appointed experts and the Expert Geriatrician and offers neither any basis upon which the Trial Chamber could reasonably reject the expertise provided nor cogent reasons for why the court-appointed experts should now be substituted.⁶⁷ For the above reasons and those which follow, the Trial Chamber has determined the Accused to be capable of effectively participating in his own defence and rejects the Defence request for the appointment of an additional expert to re-assess the Accused's fitness to stand trial.

5.2. Recent expert reports regarding the Accused's fitness to stand trial

25. On 3 September 2012, two court-appointed experts, Dr. FAZEL and Dr. Lina HUOT, concluded that the Accused does not suffer from any mental illness or cognitive impairment

⁶⁴ *Stanišić Appeals Decision*, para. 18.

⁶⁵ 3 September 2012 Report, pp. 8-9.

⁶⁶ November 2012 Expert Report, paras 10, 20; 3 September 2012 Report, para. 42 (conclusion of psychiatric experts Dr. Seena FAZEL and Dr. Lina HUOT that the Accused had the ability to plead, understand the nature of the charges, understand the course of the proceedings, understand the details of the evidence, instruct counsel, understand the consequences of the proceedings, and testify); *see also* T., 8 November 2012, pp. 35, 92-93, 96-97, 102, and 113-115 (indicating that Professor CAMPBELL discussed the Accused's fitness with the psychiatric experts before reaching the conclusions he did).

⁶⁷ Although an unsolicited letter of a consultant psychiatrist was submitted by the IENG Sary Defence to the Trial Chamber criticizing the Expert Geriatrician's methodology (Letter from Harold J. Bursztajn, MD to IENG Sary Defence Team, E238/6, 7 November 2012), the original psychiatric assessment of Drs. HUOT and FAZEL, which was the foundation of the psychiatric assessment of the Accused, was not provided to the medical consultant. The latter's conclusions are therefore entitled to little or no weight (T., 12 November 2012, p. 7).

beyond that expected of someone his age.⁶⁸ They indicated that the Accused spoke clearly and coherently, was able to concentrate during a 60 minute interview, and remembered various details about his family, health, and the trial proceedings.⁶⁹ He scored 28 out of 30 on the Mini-Mental State Examination (“MMSE”) – well above the level indicative of cognitive impairment.⁷⁰

26. After the Accused’s hospitalization on 5 and 6 November 2012, the Expert Geriatrician noted no change in the Accused’s mental state since the 3 September Report, finding that the Accused was able to remember and relate details concerning his health, family and defence counsel. Recently observed numbness in the Accused’s extremities impaired his ability to use a pen, resulting in a lower MMSE score, but did not affect, or indicate any impairment of, his mental capacity.⁷¹

27. The Expert Geriatrician, following consultation with the Accused’s treating physicians and a professor of radiology, also addressed in his report and testimony the Accused’s long-standing and chronic cardiovascular condition, lower spine osteoarthritis, vertigo, sarcopenia (wasting of the muscles) in the leg and urological disorder. He also addressed the Accused’s most recent complaints, including shortness of breath, lower and cervical back pain, dizziness and unsteadiness.⁷²

28. The Expert Geriatrician concluded these are most likely side-effects of the Accused’s chronic physical ailments, or of their treatment.⁷³ The Accused’s inactivity and muscle wastage contribute to his increased weakness and frailty. His cardiac condition and overall frailty result in on-going shortness of breath, while osteoarthritis of the lower spine results in back pain.⁷⁴ Cardiovascular conditions, vertigo, and medications may, individually or

⁶⁸ 3 September 2012 Report, para. 41.


⁶⁹ 3 September 2012 Report, paras 27, 30.

⁷⁰ 3 September 2012 Report, para. 29 (indicating that an MMSE score of 23 and lower usually indicates cognitive impairment and the need for further assessment).

⁷¹ T., 8 November 2012, pp. 23-24, 87-88, 103-108 and 120. The Accused scored 26 out of 30 on the MMSE, well above a level indicating any cognitive impairment (T., 8 November 2012, pp. 24, 104-105).

⁷² November 2012 Expert Report, paras 4, 6-9; T., 8 November 2012, pp. 12-16, 83-84.

⁷³ T., 8 November 2012, pp. 121-122 (noting that although there is a risk of stroke and shortness of blood flow to the brain, there is no sign that his symptoms are caused by this and no indication that the Accused has suffered or is suffering from either condition).

⁷⁴ November 2012 Expert Report, paras 6-9; T., 8 November 2012, pp. 12-13, 16, 27, 121, 128-130. 

collectively, cause dizziness and unsteadiness.⁷⁵ These side-effects may also be triggered by sitting for long periods, dehydration or over-heating.⁷⁶

29. For the above reasons, the Trial Chamber does not consider the Accused to suffer from any cognitive incapacity rendering him unfit to participate in proceedings. The Accused suffers numerous physical ailments, and has done so since his initial arrest and detention in 2007. While the court-appointed experts acknowledge that the Accused's physical condition may reduce the Accused's ability to concentrate, the Chamber notes the consistent findings of the experts that the impact of these physical ailments is not such as to render the Accused IENG Sary incapable of participating effectively in his own defence.⁷⁷

5.3. Available measures to treat or reduce the impact of IENG Sary's physical condition

30. In conjunction with recent assessments of the Accused's fitness to stand trial, the Chamber also requested the Expert Geriatrician to review the current medical care afforded to the Accused IENG Sary and to indicate whether further treatment options may be capable of treating the Accused's physical condition or mitigating its impact.⁷⁸

5.3.1. Review by the Expert Geriatrician of the Accused's current medical care

31. The Expert Geriatrician described the Accused's cardio-vascular condition as stable but precarious.⁷⁹ The treatment currently provided for this condition is optimal, and no adjustment to it was considered necessary. The Accused's age and condition, however, is such that the risks of resuscitation, in the event of cardiac arrest, are considerable and it was the expert's view that the Accused is not a fit candidate for resuscitation.⁸⁰ Corrective treatment of the Accused's vertigo would similarly prove challenging.⁸¹ Although the Expert Geriatrician recommended some further tests in relation to the Accused's other medical conditions, Professor CAMPBELL clarified that he did not consider these tests to be essential considering

⁷⁵ November 2012 Expert Report, para. 9; T., 8 November 2012, pp. 13, 14 (noting that heart disease results in low blood pressure which may result in dizziness), 17, 30, 77, 79 and 83-84.

⁷⁶ November 2012 Expert Report, para. 9; T., 8 November 2012, pp. 14, 78.

⁷⁷ November 2012 Expert Report, paras 20-21; T., 8 November 2012, pp. 25, 78.

⁷⁸ Memorandum, Subject: "Re-appointment of Dr. A. John CAMPBELL (IENG Sary)", E238, 8 October 2012, para. 2.

⁷⁹ T. 8 November 2012, pp. 35, 123-124.

⁸⁰ November 2012 Expert Report, paras 7, 19; T., 8 November 2012, pp. 16, 35, 123-124.

⁸¹ November 2012 Expert Report, para. 9; T., 8 November 2012, pp. 13-14.

the Accused's age, his frail condition and the unlikelihood of positive outcomes.⁸² Further, and as in the event of an emergency, resuscitation is not recommended and the Accused's other medical conditions are not amenable to further treatment, the Expert Geriatrician considered continued hospitalisation to be unnecessary. As the Expert Geriatrician considered that measures addressing the symptoms of the Accused's medical condition may be implemented in the ECCC Detention Facility or holding cell while proceedings are on-going, the Chamber ordered on 8 November 2012 the Accused's return to the ECCC Detention Facility.⁸³

5.3.2. Measures that may mitigate the impact of the Accused's physical condition

32. Despite the absence of treatment options capable of reversing the Accused's medical condition, the Expert Geriatrician indicated a number of measures that may nevertheless alleviate or mitigate its effects. Following interviews of the Accused in the hospital, Detention Facility and in the holding cell, the Expert Geriatrician observed that lying down alleviated the Accused's back pain and shortness of breath.⁸⁴ On 5 and 6 November 2012, throughout three interview sessions lasting 60 to 90 minutes, the Accused was able to concentrate and hold a conversation. Two of these sessions took place on the same day, although the Accused was lying down during these sessions.⁸⁵ The Expert Geriatrician therefore considered that the Accused would be able to concentrate during court sessions of similar length and that the existing breaks between sessions were adequate. He suggested, however, that the Accused be brought to the holding cell sufficiently early to enable him to recover from any shortness of breath or dizziness caused by his transport from the Detention Facility. The holding cell also accommodates the Accused's need to urinate frequently, as it enables assisted access to a toilet and/or plastic urinal.⁸⁶

33. Other measures, which may also be undertaken in the holding cell or Detention Facility, may further alleviate the Accused's physical condition.⁸⁷ Concerning the Accused's lower

⁸² November 2012 Expert Report, para. 17; T., 8 November 2012, pp. 30-31, 34-36, 79-80 (noting that in any case, some of these tests may be unavailable or impracticable to conduct in Cambodia).

⁸³ November 2012 Expert Report, para. 19; T., 8 November 2012, pp. 16, 131-134. The Accused initially returned to the ECCC Detention Facility on 7 November 2012. Memorandum, Subject: "Transfer of IENG Sary to ECCC Detention Facility for 8 November 2012 Hearing", E239/2, 7 November 2012.

⁸⁴ November 2012 Expert Report, para. 7; T., 8 November 2012, pp. 16, 25-26, 53, 78, and 133; 3 September 2012 Report, para. 11.

⁸⁵ T., 8 November 2012, pp. 16, 25, 53, 58, 64, 67-68 and 108-109.

⁸⁶ T., 8 November 2012, pp. 18, 53, 58, 67-68, and 75-76.

⁸⁷ T., 8 November 2012, p. 135, 138.

back pain, the Expert Geriatrician recommended that the Accused use a brace.⁸⁸ In relation to his dizziness, the Expert Geriatrician recommended the use of a “soft collar” during the day and re-assessment of the Accused’s medication, particularly those with recognized side-effects of dizziness and weakness.⁸⁹ Monitoring would also enable the ECCC medical staff to immediately treat or address any dizziness or unsteadiness resulting from a drop in blood pressure upon standing or moving.⁹⁰ Concerning the Accused’s overall frailty and weakness, a simple exercise program may gradually increase lower limb strength and balance, and dietary supplements may also prove beneficial.⁹¹ Vision testing and appropriate adjustment to the Accused’s glasses should also remedy recent complaints concerning the Accused’s eyesight.⁹²

34. Overall, and while the Expert Geriatrician considered the Accused to require greater personal care in the light of his increasing frailty and decreased mobility, this does not prevent him from participating effectively in proceedings.⁹³ Where certain accommodations are made to mitigate his condition, the Trial Chamber therefore concludes that the Accused is capable of participating effectively in his own defence.

5.4. Should the Accused IENG Sary, in the interests of justice, be ordered to participate in proceedings from the holding cell?

35. The Chamber notes that the Accused’s physical frailty has to date created a number of trial management challenges, as well as the prospect of a substantial prolongation of proceedings. To date, the Accused’s ill-health has directly resulted in the partial or total adjournment of twelve scheduled trial days.⁹⁴ Further, the Chamber’s ability to continue trial proceedings since the Accused’s hospitalisation on 7 September 2012 has largely rested upon the issuance of a waiver by the Accused IENG Sary of his right to be present during the testimony of 40 witnesses and Civil Parties, many of whom have already been heard over the past weeks.⁹⁵ Although the Chamber has previously expressed appreciation for the Accused’s

⁸⁸ November 2012 Expert Report, para. 8; T., 8 November 2012, pp. 13.

⁸⁹ November 2012 Expert Report, paras 9, 16; T., 8 November 2012, pp. 13, 17, 28, 35-36, 80 and 84.

⁹⁰ November 2012 Expert Report, para. 11; T., 8 November 2012, pp. 17, 74-75.

⁹¹ November 2012 Expert Report, para. 15; T., 8 November 2012, pp. 32-33, 130-133.

⁹² November 2012 Expert Report, paras 10, 18; T., 8 November 2012, p. 17.

⁹³ T., 8 November 2012, pp. 31-32 (considering that the detention centre is able to provide such care), 135.

⁹⁴ 21 May 2012; 22 May 2012; 23 May 2012; 24 May 2012; 13 August 2012; 12 September 2012; 13 September 2012; 17 September 2012; 18 September 2012; 19 September 2012; 26 September 2012; 27 September 2012. This list does not include those days re-scheduled in advance for hearings concerning the Accused’s health.

⁹⁵ See e.g. IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, E229, 18 September 2012; IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, E237, 1 October 2012; IENG Sary’s Limited Waiver of Right to be Present During Court Proceedings, E237/1, 13 August 2012.

cooperation in this manner, which assisted greatly in facilitating the smooth conduct of proceedings, the Chamber notes that the Defence now indicates an intention to revoke any outstanding waivers should the Trial Chamber decide on the basis of the court-appointed medical expertise that the Accused is fit to stand trial.⁹⁶

36. The Chamber further notes the determination of the Expert Geriatrician that the Accused is best able to concentrate when lying down and that in view of his increased frailty, the Accused's medical needs are most appropriately provided for in the holding cell.⁹⁷ The Expert Geriatrician did not, however, include the provision of a hospital bed in the courtroom among the list of recommendations considered either to enhance the Accused's welfare or to be medically appropriate. As the holding cell is accessible at all times by members of his Defence team and the ECCC Medical Unit, the Chamber does not consider video-recording of the holding cell to be necessary to ensure that the Accused is appropriately monitored. The Trial Chamber considers that the holding cell provides adequate and appropriate means to meaningfully participate in the proceedings.

37. The Chamber therefore considers that the Accused's participation by audio-visual means from the holding cell may be ordered in the interests of justice and provides early notice to the parties that the Chamber may do so where no medical basis exists to justify the Accused's absence from proceedings, but where the Accused's presence in the courtroom would be contrary to his medical interests and/or to the expeditious conduct of the trial. This finding is without prejudice to the Accused's right to otherwise elect to be present in the courtroom during trial proceedings at all times, to expressly waive his right to be present altogether, or to receive medical treatment outside the ECCC premises where determined by the Chamber to be medically necessary.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

AFFIRMS its earlier finding that the Accused IENG Sary is capable of meaningful participation in his own defence and is therefore fit to stand trial;

DENIES the Defence request to appoint a new expert to reassess the Accused's trial fitness;

Previously, the Accused did not waive his right to be present for witness testimony concerning "him either directly or indirectly or go into acts and conduct which are alleged against him" (T., 23 May 2012, p. 3); *see also Zigiranyirazo Appeal Decision*, para. 21 (noting that an accused has a stronger interest in being present when witnesses testify as to his acts and conduct).

⁹⁶ T., 12 November 2012, pp. 44-45, 52.

⁹⁷ November 2012 Expert Report, paras 20-21; T., 8 November 2012, pp. 16-17, 25-26, 78, 133.

DIRECTS the Medical Unit and Detention Facility, as appropriate, to implement the recommendations of the Expert Geriatrician set out in paragraphs 32 and 33 of this decision;

REJECTS the Defence request that the Accused be video-taped in the holding cell or that a hospital bed be provided in the courtroom;

DETERMINES that a stay of proceedings, adjournment or severance of the Accused's case to enable further medical testing or treatment is currently unwarranted and would unreasonably infringe upon the right of all Accused in Case 002 to a fair and expeditious trial;

FURTHER ADVISES the parties that upon implementation of measures set out in paragraphs 32 and 33 of this decision, the Chamber shall resume proceedings in relation to all witnesses, Civil Parties and experts scheduled to appear in Case 002/01, including those for whom IENG Sary has not waived his right to be present;

INDICATES that the Chamber may henceforth order the Accused's participation in proceedings from the holding cell pursuant to Internal Rule 81(5) where it considers that the interests of justice so require, except where

- a) the Accused opts to be physically present in the courtroom, and where the exercise of this right is not inconsistent with measures necessary to ensure the Accused's physical well-being or to ensure the smooth conduct of the trial;
- b) the Accused waives his right to be present during proceedings; or
- c) the Accused's absence from the courtroom or holding cell is occasioned by a change in his medical condition or is otherwise justified.

NOTES that in accordance with Internal Rule 104(4), immediate appeal of the present decision does not stay proceedings before the Trial Chamber.

Phnom Penh, 26 November 2012
President of the Trial Chamber



Handwritten signature
Nil Nodi.